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COURT OF APPEALS
STATE OF WASHINGTON

No. 320961

IN THE COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

State of Washington, Respondent
v.
Richard M. Payne, Appellant

APPELLANT'S REPLY BRIEF

David R. Hearrean
WSBA#17864
Attorney at Law
P.O. Box 55
Wilbur, WA 99185
davidhearrean@gmail.com
(509)324-7840

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Appellant's Reply Argument

A. <u>Mr. Payne disputes the facts listed by the State in Statement of Case</u>

Mr. Payne first disputes the state's Statement of Facts when it claimed that the video showed him "fondling himself" and "pull his penis out of his pants". Nowhere in the video does it show such claims. 5RP 962-979; CP D221-222. Next, Mr. Payne disputes the state's claim that K.C.'s demeanor was scared and shocked" as claimed at page 5 of the state's brief. It was only after A.R.H.'s mother and others overreacted to false claims of what the video actually showed did her demeanor change and police called. 6-28-13 Hrg RP 49-50, 66-68; 5RP 844, 848-850. Additionally, the state's claim that "the girls went to another game trying to avoid Mr. Payne" is incorrect and not supported by the record. P.5 of State's Brief. Next, Mr. Payne denies that he was "rubbing A.R.H.'s leg and pulling up her dress" and that A.R.H. was "paled, freaked out, and was speechless". Mr. Payne adamantly denies that he had "his penis out". The video does not show such false accusations. 5RP 962-979; CP D221-222. The video shows KC and ARH playing on the machines and enjoying the games without any such

signs such as "she tried to get ARH away from defendant as quickly as possible" as the state claims. KC testified that she did not even see Mr. Payne while on the Jet Ski and did not change machines because of Mr. Payne. She also testified that she was taught to not talk to strangers and report it to an adult if a stranger tries to talk to her. Thus, Mr. Payne claims that KC only overreacted by a stranger and went to report this as instructed and never saw anything inappropriate. However, when everyone watched the video and incorrectly assumed they saw something and "lost it", KC then embellished what she heard and saw during the video viewing. (4RP 706, 712-714; 5RP 828, 843-851). Additionally, Mr. Payne disputes the state's claim that "he tried to avoid her and left the arcade as soon as he could". This is speculation since no one can tell what another is thinking. See p. 6 of State's Brief.

Mr. Payne also disputes the state's claim that "Detective Lebsock could see over the fence" such as in "plain view" exception. The record verifies otherwise. The detective had to cross over the boundary line/curtilage and onto the grass and tip toe and actually hang onto and lean over the side and backyard

privacy vinyl 6 foot high fence. Then and only then could he view Mr. Payne in the backyard. (Ex D108-109; 6-28-13 Hrg RP 88-90; 1RP 75-79). Finally, Mr. Payne disputes the state's claim that he confessed. He adamantly points out that he only told the detectives what they wanted to hear after the detectives surrounded him with threats of jail and other coercive moves and misrepresented that the video showed him with his penis exposed and touching a girl. See p. 7 of State's Brief; 1RP 119-121. Finally, Mr. Payne disputes the state's claim that the 2001-Attempted First Degree Child Molestation conviction was properly admitted for Count III and under 404(b). See p. 8 of State's Brief and below.

B.Evidence of Mr. Payne's single conviction over 10 years ago was improperly admitted

The state contends that the prior conviction was properly admitted to prove an element of Count III; however, the state fails to mention that Mr. Payne on numerous occasions agreed to stipulate to the conviction under the RCW number in order to avoid the serious prejudice of naming a sex offense conviction in a separate and unrelated trial for a sex offense. Additionally, the prior conviction proves nothing but prejudice to the jury. As a result, Mr. Payne did not receive a fair trial. The state also claims that

according to *State v. Roswell*, 165 Wn.2d 186, 196 P.3d 705 (2008), Mr. Payne "cannot stipulate" to the prior sex conviction and completely remove from the jury's consideration. However, the State did not fully read all of the record and pleadings. Mr. Payne was clearly asking only what was suggested by the Supreme Court and that is to either bifurcate or use the RCW number as the statute reads instead of actually naming the conviction as "Child Molestation". See RCW 9.9A.88.010. The court and the prosecution also refused to consider this prejudicial effect.

Next, the state claims that the 2001 conviction was admitted under ER 404(b) to (1) establish a common scheme or plan, (2) prove motive or intent or sexual gratification, and (3) refute a claim of accident or mistake. See p. 10 of State's Brief. However, the state failed to consider that it takes more than a single prior act to establish a "common scheme and plan". As stated in two other states, one similar instance is not sufficient to prove a pattern of conduct. *State v. Patnaude,* supra, 140 Vt. 379, 438 A.2d 402. Even in states which expressly permit evidence of prior sexual conduct to establish a pattern of conduct, evidence of one sexual encounter is not enough to do so. See, e.g., *Hodges v. State,* 386

So.2d 888, 889 (Fla.Dist.Ct.App.1980). Additionally, common scheme and plan requires 'where several crimes constitute parts of a plan in which each crime is but a piece of the larger plan' and (2) where 'an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes.' "State v. Gresham, 173 Wn. 2d 405, 421–22, 269 P. 3d 207 (2012) (quoting Lough, 125 Wash.2d at 854–55, 889 P.2d 487)(emphasis added). Finally, the extensive lapse of time, ie, over 10 years also reduces such legal common scheme and plan findings under ER 404(b). See also. *State v. Chiles*. 847 S.W. 2d 807, 810 (Mo App 1992), (the period of time separating the prior offense from the offense being charged is an additional factor which should be considered when determining the admissibility of prior crimes); *State v.Booker,* 348 N.W. 2d 753,754 (Minn. 1984), (determining that sexual conduct one week before the incident did not establish a common scheme or plan); *State v. Cassidy*. 3 Conn. App. 374,489 A. 2d 386,392 (Conn. App. 1985), cert denied. 196 Conn. 803,492 A. 2d 1239 (1985), (holding that a single instance of similar conduct does not constitute a pattern); and *State v. Wright*. 719 N.W. 2d 910, 917-918 (Minn. 2006), (if the prior crime is simply of the same generic

type as the charged offense it ordinarily should be excluded). Thus, the state is incorrect on its conclusion that a single prior conviction over 10 years ago can constitute a common scheme and plan.

The state next claims at p. 10 that the court properly admitted the prior 2001 conviction under ER 404(b) to prove motive or intent to commit sexual gratification. However, it ignores the fact that motive, intent and sexual gratification are not elements of the charges in this case and thus irrelevant and unduly prejudicial. For as held in State v. Lorenz, 152 Wn. 2d 22, 93 P. 3d 133 (2004), sexual gratification is not an essential element of first degree child molestation that must be included in the to-convict instructions. The State should clearly concede, to admit evidence of other acts to establish intent, intent must be at issue. State v. Salteralli, 98 Wn. 2d 358, 365-366, 655 P. 2d 697 (1982). State v. Ramierez, 46 Wn App 223, 730 P. 2d 98 (1986). Of course, since intent is not a material element of the charged offenses, there is no effort by the State to analyze how the alleged "other acts" fit this purpose. The effort runs afoul of ER 401, ER 402, ER 403 and ER 404(b).

The state also claims that the trial court properly admitted the 2001 prior conviction under ER 404(b) to refute a claim of accident or mistake. However, Mr. Payne never claimed that he accidently touched anyone and his defense was that the video (Ex D221-222) showed his claim. 5RP 962-979. Thus, accident or mistake is irrelevant and admitting such prior stale sex offense conviction in a trial for a sex charge is unduly prejudicial.

Mr. Payne also disputes the states claim at p. 10-12 of the State's Brief that Judge O'Connor properly weighed the probative against the prejudicial value of admitting the 2001 prior conviction. Mr. Payne points to the fact that the trial court never properly weighed the severe prejudicial effect that the prior sex conviction would have on a similar sex charge trial or the time lapse of the 2001 case. Judge O'Connor just summarily found in a conclusory manner that "my view is the probative value outweighs the prejudicial effect" and this was only after the prosecutor reminded her that she needed to make a finding on the issue. 1RP 177-178. Thus, the judge made such a finding without considering or articulating the true prejudicial effect of a single prior sex offense used in a trial for a sex offense and the extensive time lapse

without weighing on the record the basis and why she felt that the probative value outweighed the prejudicial effect. Next, Judge O'Connor never considered the severe prejudicial effect of the prior victim and mother testifying and crying on the stand which was unnecessary and cruel. 4RP 731-742. Additionally, the court's findings of fact and conclusions of law does not even mention any of these major factors or why. This same dispute also applies to Count III. CP 628-630. Finally, since the jury was informed of Mr. Payne's 2001 sex offense conviction, they only concluded that his prior offense verifies his actions and he acted in conformity therewith which is prohibited under ER 404(b). The prosecutor clearly violated this prohibition when he argued in his closing. Mr. Cruz clearly told the jury "it (prior 2001 sex offense conviction) was brought to you also for you to consider what was his actions". 5RP 950.

C.Standing objection to informing jury that Mr. Payne was convicted of 2001 offense

The state also appears to argue at p. 13-17 of its brief that Mr. Payne waved his standing objection to the prior sex offense from 2001 being introduced to the jury when a stipulation was entered regarding Counts I, II and III. However, Mr. Payne clearly

noted a standing objection on the record (3RP 381, 384) and in the pleadings (CP 642-646, 649-651) including the Motions in Limine (CP 604-607) numerous times and the trial court and the prosecutor accepted Mr. Payne's continuing objection. The state is attempting to misdirect this court's attention from the prejudicial effect and back to Mr. Payne's prior Attempted Child Molestation 2001 conviction. The state is referring to Judge O'Connor threat and Hobson's choice she gave Mr. Payne when she stated during jury instructions that either he stipulate to the conviction by name or she would order that the 2001 Judgment and Sentence be given to the jury during deliberations. In fact, Judge O'Connor ignored Mr. Payne's motions and continuing objections and still read to the jury during jury selection that Mr. Payne was convicted of Attempted First Degree Child Molestation. This is unfair, prejudicial and error and Mr. Payne argues that this is another example of the Honorable Judge O'Connor's bias and breach of appearance of fairness. 2RP 386-389. Additionally, our Washington State Supreme Court has held that such standing objection as offered by Mr. Payne regarding the admission of the prior sex offense conviction is deemed a continuing objection for the appeal. In

State v. Powell, 126 Wash.2d 244, 256 (1995), the state made a similar argument and the Supreme Court held that a different situation is presented, however, when, as here, evidentiary rulings are made pursuant to motions in limine. See CP 604-607. Because the purpose of a motion in limine is to avoid the requirement that counsel object to contested evidence when it is offered during trial, the losing party is deemed to have a standing objection where a judge has made a final ruling on the motion, "[u]nless the trial court indicates that further objections at trial are required when making its ruling" which did not occur in the present case. *State v. Koloske,* 100 Wash.2d 889, 895, 676 P.2d 456 (1984), *overruled on other grounds by State v. Brown,* 111 Wash.2d 124, 761 P.2d 588 (1988), 113 Wash.2d 520, 782 P.2d 1013 (1989); *Fenimore v. Donald M. Drake Constr. Co.,* 87 Wash.2d 85, 91, 549 P.2d 483 (1976); *see also State v. Kelly,* 102 Wash.2d 188, 193, 685 P.2d 564 (1984); *Garcia v. Providence Med. Ctr.,* 60 Wash.App. 635, 641, 806 P.2d 766, *review denied,* 117 Wash.2d 1015, 816 P.2d 1223 (1991).

D. Mr. Payne has constitutional right to interview witnesses before trial and in-person and confront witnesses

The state claims that Mr. Payne has no right to interview ARH prior to trial and also no right to an in-person interview. The state additionally claims that State v. Burri, 87 Wash.2d 175, 181 (1976) only refers to a prosecutor interfering with the defense interviews. However, the state fails to consider that the present case involves life in prison punishment and ARH is the only listed victim in Counts 1 and 2 which resulted in such severe penalty. First, Judge O'Connor made it clear and ruled that the defense will not interview or bother ARH since the state is not calling her as a witness. She specifically stated on the record that "I certainly would not want, frankly, anybody interviewing her, either the state or defense". 1RP 46. In fact, Judge O'Connor denied Mr. Payne's motion (CP 132-141) asking for a court order requiring the prosecution to make available the out of state witnesses for such in-person interview or any interview. The court also refused to pay with public funds the costs of travel out of state for such interviews despite the fact that Mr. Payne was indigent.2RP 224; CP 159, 160-161. On the other hand, the court allowed the state to pay for the victim's mother's lost wages from public funds. 3RP 379. Mr. Payne claims that this is unfair and violates his due process rights,

including the right to a fair and impartial trial plus right to counsel and compulsory process under the state and federal constitutions. *U.S.Const. amend. 6; Wa. Const. art. 1, s 22, CrR 3.1.* Additionally, the state misrepresents the standing in *Burri* in that the courts specifically ruled that the right to counsel and compulsory process to include the right to interview witnesses prior to trial can be violated by the state as well as the judge which Mr. Payne claims occurred. *Burri* at 181. Finally, Mr. Payne argues that such conduct by the prosecution and judge has been condemned in both federal and state courts as a denial of due process and thus a ground for the reversal of any conviction resulting therefrom. *Brady v. Maryland,* 373 U.S. 83,10 LEd. 2d 215, 83 Sup. Ct. 1194 (1963); *United States* ex *rel. Meers v. Wilkins,* 326 F.2d 135 (2d Cir. 1964). Additionally, the Washington State Constitution provides greater protection than the Fourth Amendment to the U.S. Constitution. State v. Boland, 115 Wn.2d 571; 800 P.2d 1112; 1990.

E. Judge O'Connor violated the appearance of fairness doctrine and should have recused

The state next claims that Judge O'Connor properly denied Mr. Payne's motion and continuing objection for her to recuse. The

state further claims that Mr. Payne did not cite evidence of either actual or potential prejudice and that a reasonable person would agree. Mr. Payne disagrees and refers this court to the listed numerous examples of Judge O'Connor actual or potential prejudice which a reasonable person would also agree. Finally, the state claims that Mr. Payne never cited any examples of prejudicial acts; however, Mr. Payne counters that Judge O'Connor's specific opinions and bias were a major portion of her decision to admit a prior stale sex offense conviction under 404(b) as well as other numerous acts listed from the record. These listed numerous prejudicial acts[i] include more than finding Mr. Payne's counsel in contempt and demeaning counsel's wife as claimed by the state. Judge O'Connor also unjustly proceeded with a critical portion of the trial without Mr. Payne's presence and issued a warrant for his arrest and denied almost every motion including attempts to interview the sole victim of Counts 1 and 2 which resulted in a severe life in prison punishment. (6-28-13 Hrg RP 114-115; 1RP 8, 16,30-31,34,38,42,46,68-69,379).

F. Insufficient evidence for jury verdict on count 1

The state claims that there was sufficient evidence for the jury to convict on Count 1 and that there were other witnesses who testified. However, the record is clear that no witness observed or testified that they observed Mr. Payne touch ARH as alleged in Count 1. 5RP 844. Additionally, the state alleges that Mr. Payne confessed to touching ARH in Count 1. However, Mr. Payne counters that he was coerced into making the false confessions as stated above and during his testimony. 1RP 117-121. Thus, Count 1 should have been dismissed as well as the other counts or at least a new trial granted with a different judge.

G. Trial court violated Mr. Payne's constitutional right to be present during critical stage regarding his representation of counsel

The state next argues that the show cause hearing that Judge O'Connor conducted without Mr. Payne's presence had no bearing on his case or right to confront witnesses. Thus, it was not a critical stage. However, *State v. Irby*, 170 Wn.2d 874, 880-81, 246 P.3d 796 (2011) clearly states that the protection afforded a defendant to the right to be present under the confrontation clause of the state and US Constitution even applies in some situations where the defendant is not confronting witnesses or evidence

against him. Mr. Payne claims that the show cause hearing involved his right and choice of counsel and he was told by Judge O'Connor that it did not involve him when in fact it did and Mr. Payne should have been present to assist in this important decision. In fact, Judge O'Connor thought it to be critical for him to be there since she issued a warrant. However, Judge O'Connor was starting her vacation and did not want the show cause to interfere with her plans. Therefore, she proceeded without Mr. Payne's presence on her own and over counsel objection for a continuance. In fact, Judge O'Connor kept saying during the show cause that Mr. Payne should be here since it involves his legal representation. Therefore, the show cause hearing was not just a hearing where his presence would be useless or just a shadow as clarified in *Irby*. This hearing involved a critical stage where Mr. Payne's substantial right to counsel may be affected under art.1 sec. 22 of the Washington Constitution and the confrontation clause of the US Constitution. Again, the courts have clearly stated that this protection is "triggered at any time during trial that a defendant's substantial rights may be affected". *Id.*, at 107. (emphasis added). Additionally, the scheduling order (CP535) was

confusing and had the date for Mr. Payne's new trial date of September 30, 2013 which Mr. Payne believed only involved him and the show cause only involved counsel. In fact, the scheduling order basis mentioned only involving his counsel as Mr. Payne was told by Judge O'Connor that "Mr. Payne is not involved in this". (8-1-13 Afternoon Session SC Hrg RP 269)(8-19-13 Hrg RP 1-11; 8-1-13 and 8-16-13 Contempt Hrg RP 244-306). Therefore, the state is incorrect when it claims that nothing prevented Mr. Payne from attending and the critical hearing did not involve anything substantial. Mr. Payne claims that he was incorrectly told by Judge O'Connor that it did not involve him when it did and this judge proceeded with the critical hearing without Mr. Payne. Mr. Payne argues that his constitutional rights are more important than Judge O'Connor's schedule and her vacation. He further argues that Judge O'Connor should have continued the show cause to after her vacation and corrected her direction to Mr. Payne and rescheduled for him to attend. By not doing so, the trial court erred.

H. Judge O'Connor erred by not giving WPIC 5.20 missing-witness jury instruction

The state next argues that Judge O'Connor did not err by refusing to give the missing witness jury instruction although the

only alleged victim, ARH, was not called to the stand or subpoenaed by the prosecution. Additionally, the state claims that ARH is "emotionally traumatized" and unimportant and cumulative. The state also claims that the court was informed by a counselor that ARH could not testify. However, the record does not support that a counselor ever testified or filed a declaration at trial or at any of the hearings. Additionally, there was no evidence that ARH was "emotionally traumatized" as the state claims. Most important, ARH was the only alleged victim in Counts 1 and 2 that resulted in a life sentence for Mr. Payne and the state's claim that she was not important is unbelievable and unrealistic. Who else could testify about being actually touched other than the person alleged to have been touched? No one could even testify about the alleged touching in Count 1. 5RP 828, 831, 844, 848-850; 4RP 706,712-713, 714. Mr. Payne also claims that K.C. was coached and suggested by others after viewing a video that everybody admittedly over reacted and assumed something happened. Mr. Payne argues that the state is shifting the burden of proof to the defendant and speculating that ARH is not material or necessary.

Judge O'Connor erred by not giving the WPIC 5.20 Missing Witness Jury Instruction.

I. The trial court erred by not suppressing Mr. Payne's statements

The state also argues in its brief that Mr. Payne was not in custody; therefore, Miranda rights do not apply. However, the record is clear that Mr. Payne felt that he was not free to leave and had to obey the detectives demand to come to them from the backyard. Mr. Payne was then surrounded and informed that he would go to jail unless he told them what they wanted to hear. The detectives also misrepresented what the video actually showed and tricked Mr. Payne into believing that the video showed his penis. Additionally, the detective touched his gun which Mr. Payne noticed and further felt he was not free to leave. 6-28-13 Hrg RP 74-90: 1RP 75-79, 94-97, 105, 117-135; Ex D109. As the U.S. Supreme court has ruled: "Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege. The requirement of warnings and waiver of rights is fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation". *Miranda v.*

Arizona, 384 U.S. 436, 476, 986 S.Ct. 1602, 1629 (1966) (emphasis added). Therefore, all these stated actions noticed by Mr. Payne and testified by the detectives during the 3.5 and 3.6 hearing represent evidence that Mr. Payne was in custody and although he was read his rights, the detective's threatened, tricked or cajoled him into a waiver and coerced Mr. Payne into a false confession.

The state also claims at p. 35-36 that *State v. Seagull*, 95 Wn.2d 898, 902, 632 P.2d 44 (1981) is controlling and this 1981 court allows such intrusions after knocking on the door and receiving no answer. However, Mr. Payne counter claims that this is a 1981 case and the U.S. Supreme Court recently reset a bright line rule in 2013 that is different from what applied in 1981. He points out that the state failed to consider or even cite the U.S. Supreme Court in Florida v. Jardines, 133 S. Ct. 1409, 1415, 185 L. Ed. 2d 495, (2013) that ruled:

> We therefore regard the area "immediately surrounding and associated with the home"—what our cases call the curtilage—as "part of the home itself for Fourth Amendment purposes."

> This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters.
>
> ... an officer's leave to gather information is sharply circumscribed when he steps off those thoroughfares and enters the Fourth Amendment's protected areas. (emphasis added).

Additionally, Article 1 Section 7 of the Washington State Constitution provides greater protection than the Fourth Amendment to the U.S. Constitution. State v. Boland, 115 Wn.2d 571; 800 P.2d 1112; 1990. When "the Government obtains information by physically intruding" on persons, houses, papers, or effects, "a 'search' within the original meaning of the Fourth Amendment" has "undoubtedly occurred." *United States v. Jones, 132 S. Ct. 945, 181 L. Ed. 2d 911, 919* (2012). The detectives testified that they were at Mr. Payne's front door to gather evidence and did not have a search warrant. After no answer, the detectives did not leave as the Supreme Court has ruled but traveled through

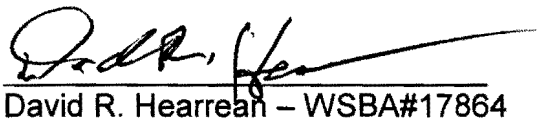
the protected areas to the side of the house and backyard. The detective then tip toed over the six foot high vinyl privacy fence and raised his voice and ordered Mr. Payne out to exit the backyard so they could gather evidence against him. Additionally the state argues that Mr. Payne was not seized which triggers the constitutional protections. However, a "seizure" occurs when a person is restrained by means of physical force or a show of authority. The relevant inquiry... is whether a reasonable person, under a totality of circumstances, would have felt free to leave or otherwise decline the officer's requests and terminate the encounter." Id. at 351-52; *State v. Barnes, 96 Wn. App. 217, 222, 978 P.2d 1131 (1999)*. This rule also applies to the stopping of an automobile and detention of its occupants. *Delaware v. Prouse, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979)*. Therefore, Mr. Payne claims that the he was not free to leave or terminate the encounter and all evidence gathered including his statements should have been suppressed. 6-28-13 Hrg RP 74-90: 1RP 75-79, 94-97, 105, 117-135; Ex D109.

J. Conclusion

Based on the legal authority and arguments as stated in this reply and previously filed petition for review, Mr. Payne asks the court to dismiss this case with prejudice or in the alternative release Mr. Payne from prison and order a new trial with a different judge.

Dated this 28th day of January 2015.

Respectfully submitted,



David R. Hearrean – WSBA#17864
Attorney for Richard Payne

Please note that any reference in Appellant's Brief and Reply Brief to the 8-1-13 and 8-16-13 transcript record is 2RP-Volume 2.

[i] **One example was when Mr. Payne's defense counsel experienced technical or mechanical problems with the defense video exhibit (Ex D222) during a vital portion of the closing argument and asked for a minute to fix, Judge O'Connor refused to excuse the jury and this judge complained in front of the jury that "We have been at this for about 15 minutes....at this point I would like to get this going".(Oct 7, 2013 Trial RP 975-976). Mr. Payne also complains that Judge O'Connor raised her voice in a very threatening manner saying that defense counsel will never again interrupt her while she is talking or object while she is talking. (Nov. 20, 2013 Sent. RP 1017-1018). Judge O'Connor admitted that maybe she "tipped him (Mr. Payne's defense counsel, Mr. Hearrean) over or what...". (August 1, 2013 Ct. Hrg. RP 257, lines 16-18). The record shows that Judge O'Connor even personally attacked Mr. Hearrean's wife by saying she (Mrs. Hearrean) "was a major problem." (August 1, 2013 Ct. Hrg. RP 255, line 10). Mr. Payne also adds that Judge O'Connor purposefully conducted an important hearing (show cause) without Mr. Payne's presence which he has an absolute right to attend. (Aug.16, 2013 Motion Contempt RP 244-271). He alleges that Judge O'Connor showed further bias and prejudice against him when she attempted to convince him (unsolicited) to fire his attorney and apply for a**

public defender in violation his right to his attorney of choice and appearance of fairness doctrine. (Aug. 1, 2014 AM Session RP255, RP265, RP267).[i] Mr. Payne also points out that Judge O'Connor mis-stated the record and alleged that she specifically ordered Mr. Payne to be at the show cause hearing; thus, she issued a warrant for his arrest.[i] However, the transcribed court record does not reflect such judicial order as Judge O'Connor stated.(Aug. 1, 2014 Ct Session RP 244-306). Additionally, Judge O'Connor never served Mr. Payne with the show cause order she ordered prepared at her direction. Judge O'Connor also allowed and sided with the prosecutor to argue motions without adequate notice; allowed the prosecutor to delay until the last minute to set up defense interviews of key witnesses and allowed and sided with the prosecutor's witnesses who refused to be interviewed. (Mar 15, 2013 Status RP 16-19)((July 26, 2013 Motion Hrg RP 227-243). Judge O'Connor also cancelled Mr. Payne's defense counsel's scheduled prepaid vacation and used defense counsel's arguments on another matter as a basis which involved not using a scheduled vacation for law enforcement as a basis for allowing a video deposition in lieu of testimony at trial. (July 26, 2013 Motion Hrg RP 241-243). However, the court was very verbal about allowing law enforcement to have a vacation. (July 9, 2013 Motion RP 63). Mr. Payne also alleges that Judge O'Connor was bias when she refused to appropriately schedule a fair chance for defense counsel to interview witnesses or have available to him for in-person defense interviews of key prosecution witnesses prior to trial or even order timely interviews of such witnesses and this same judge refused to make these witnesses available to him at no costs since he was indigent. (May 28, 2013 Motion Hrg RP 38-54; July 9, 2013 Motion Hrg RP 57-70).On the other hand, Judge O'Connor allowed the prosecutor to pay KC's mother $100 for lost wages caused by her testifying. (Sept. 30, 2013 Motion RP 379-380); however, this judge and prosecutor refused to assist Mr. Payne's right to confront and call witnesses at no expense to him even though the court knew he was indigent. (Aug. 16, 2013 Show Cause RP 297). Mr. Payne next claims that he was forced with an illegal Hobson choice when Judge O'Connor allowed the prosecutor to submit untimely documents for sentencing and give him a choice of either given up his right to a speedy sentencing or his right to a fair sentencing unprepared by surprise. Judge O'Connor also found Mr. Payne's defense counsel in contempt for being ill (CP 529-559) and sending officers to his personal residence and also ordering defense counsel to appear in court while very ill.